Public Prosecutor v Dis Bayak

HIGH COURT (SIBU) — CRIMINAL TRIAL NO SBW-45–10/7 OF 2014
SUPANG LIAN J
29 NOVEMBER 2014

Criminal Law — Offences — Murder — Whether ingredients of charged proved beyond reasonable doubt — Whether evidence by witnesses admissible — Whether hearsay evidence — Confession and admission — Accused surrendered himself to police and declared he killed deceased — Whether confession or admission — Whether admissible — Whether accused's knowledge of weapon implicated him for murder of deceased — Penal Code, s 302

The accused was charged under s 302 of the Penal Code for the offence of murder. PW2 testified that the accused came knocking on his door saying that something had happened. When PW2 asked the accused what had happened, the latter did not answer. PW2 then brought the accused to see the camp manager ('PW3'). On PW3's instruction, PW2 went to look for the camp mandore at his quarters, leaving the accused behind with PW3. PW3 then gave instructions to the mandore ('PW4') to go to the logging site to find out what had happened. PW4 went to the logging site and proceeded to a workers' hut where they found Kueng Ding ('the deceased') lying motionless on the kitchen floor. PW4 met the wife of the deceased in the hut. When he asked her what had happened she did not answer but kept on crying. The deceased's foster mother and wife told PW4 that the deceased was shot by the accused. Next to testify on this was PW6. She said that after the burial of the deceased, the deceased's wife told her that the deceased died after being shot by the accused. The deceased's wife also told her that she witnessed the shooting but did not know the reason why. The prosecution next called Const Muhamad Azli Hafidz ('PW9') who testified that whilst he was on duty, the accused came alone and told him that he wanted to surrender himself for he had shot and killed a man known as Kuing. The investigating officer ('PW18') testified that during interrogation, the accused informed him that he could show to him a workers' hut. They arrived at the workers' hut and the accused pointed to a place on the floor of the kitchen where a shotgun was found. The defence objected to the admissibility of the statement of the accused on the basis that except as provided in s 113(1) of the Criminal Procedure Code ('the CPC') no statement made by any person to a police officer in the course of police investigation made under Chapter XIII of the CPC shall be used as evidence. The defence also said that the statement amounted to a confession and it was inadmissible under s 17(3) of the Evidence Act 1950 ('the EA').

Held, discharging and acquitting the accused without his defence being called:

(1) The evidence of PW2 and PW3 did not implicate the accused in the death of the deceased in any manner whatsoever. The accused's appearance at PW2's door occurred three hours after the deceased had allegedly died on the same day. At best, all PW2's and PW3's evidence did was to attract attention to the fact that the accused knew something had happened. PW3's evidence that he was informed by PW4 that the wife of the deceased had told PW4 that the accused had shot the deceased, was obviously inadmissible for it amounted to hearsay upon hearsay (see para 9).

(2) Section 17(3) of the EA says that sub-s (2) shall have no application in Sarawak. Only s 17(1) is applicable in Sarawak. Pursuant to the provisions of s 21 of the EA, admissions are relevant and may be proved as against the person who makes them. Therefore, a statement made by a person as to any fact in issue or relevant fact may be admissible in evidence. However, whether a statement is admissible will depend on the facts and circumstances of the particular case. As provided for in s 17(1) of the EA, the words 'made by any of the persons and under the circumstances hereinafter mentioned' would require that the sub-section should be read together with the other sections of the Act that follow, in particular, the provisions of ss 24, 25 and 26 of the EA which contained prohibitions against the admissibility of confessions made under the circumstances specified (see paras 13 & 14).

(3) The statement given by the accused to PW9 that he had shot and killed a person called 'Kuing' was unmistakably a confession and an admission. PW9 testified that he was of the rank of constable on when the accused made the statement to him. In view that the confession or admission of the accused was made to a police officer who was below the rank of inspector, it was inadmissible under s 25(1) of the EA. For this reason, notwithstanding that police investigation had not yet begun when the accused made the statement to PW9, as the prosecution had contended, the statement of the accused was inadmissible. As such, other than the act of the accused in surrendering himself, there was nothing else from the evidence of PW9 to implicate the accused in the offence charged (see para 15).

(4) If the information from the accused, be it in the form of a statement, or act or conduct such as pointing out, leads distinctly to the discovery of a fact, it is admissible. Hence, there was no requirement in law for the police to administer any cautionary words before the information was obtained and certainly no necessity of conducting a trial within a trial to determine the voluntariness of the information. The statement of the accused to PW18 that he could show them a workers' hut and the accused's act of leading PW18 and the police team to the workers' hut

amounted to information. Since the information related distinctly to the discovery of a fact – the workers' hut – it was admissible under s 27 of the EA (see paras 17 & 18).

(5) If the shotgun was proved to have been used in the commission of the offence, then the accused's knowledge of the place where it could be found becomes very relevant as part of the chain of circumstantial evidence from which the guilt of the accused could be inferred. Although the shotgun was found to be serviceable and the accused's DNA was detected on it, in light of the absence of gun powder residue in the barrel of the shotgun and in the cartridge casing in such circumstances, the shotgun could not have been the shotgun from which the pellets or bullets that killed the deceased originated from. As such, even if the accused had knowledge of the whereabouts of the shotgun, it did not implicate the accused in anyway in the death of the deceased as it had not been proved that the shotgun was used in the commission of the offence (see paras 21 & 28).

[Bahasa Malaysia summary

Tertuduh telah didakwa di bawah s 302 Kanun Keseksaan atas kesalahan membunuh. PW2 telah memberi keterangan bahawa tertuduh datang mengetuk pintunya dan mengatakan bahawa sesuatu telah berlaku. Apabila PW2 bertanya kepada tertuduh apa sedang berlaku, tertuduh tidak menjawab. PW2 kemudian membawa tertuduh berjumpa pengurus kem ('PW3'). Atas arahan PW3, PW2 pergi mencari mansur kem di kuartersnya, meninggalkan tertuduh bersama PW3. PW3 kemudian memberi arahan kepada mandur itu ('PW4') untuk pergi ke tapak pembalakan untuk mengetahui apa yang berlaku. PW4 telah pergi ke tapak pembalakan dan terus ke arah pondok pekerja di mana mereka menjumpai Kueng Ding ('si mati') terbaring kaku di atas lantai dapur. PW4 menemui isteri si mati dalam pondok itu. Apabila dia bertanya kepadanya apa yang telah berlaku dia tidak menjawab tetapi terus menangis. Ibu tiri si mati dan isterinya memberitahu PW4 bahawa si mati telah ditembak oleh tertuduh. Kemudian PW6 telah memberi keterangan tentang perkara ini. Dia mengatakan bahawa selepas pengebumian si mati, isteri si mati telah memberitahunya bahawa si mati meninggal dunia selepas ditembak oleh tertuduh. Isteri si mati juga memberitahunya bahawa dia menjadi saksi kepada tembakan itu tetapi tidak mengetahui sebab kenapa. Pendakwaan telah memanggil Konst Muhamad Azli Hafidz ('PW9') yang memberi keterangan yang semasa dia bertugas, tertuduh datang sendiri dan memberitahunya bahawa dia ingin menyerah dirinya sendiri kerana dia telah menembak dan membunuh seorang lelaki yang dikenali sebagai Kuing. Pegawai siasatan ('PW18') telah memberi keterangan bahawa semasa soal selidik, tertuduh datang sendiri dan telah memberitahunya bahawa dia ingin menyerah dirinya sendiri kerana dia telah menembak dan membunuh seorang lelaki yang dikenali sebagai Kuing. Pegawai siasatan ('PW18') telah memberi keterangan

bahawa semasa soal selidik, tertuduh memberitahunya bahawa dia boleh menunjukkan kepadanya pondok pekerja. Mereka tiba di pondok pekerja itu dan tertuduh menunjuk tempat atas lantai dapur di mana senapang patah itu dijumpai. Pembelaan membantah terhadap kebolehterimaan kenyataan tertuduh berdasarkan bahawa kecuali sepertimana yang diperuntukkan dalam s 113(1) Kanun Tatacara Jenayah ('KTJ') tiada kenyataan telah dibuat oleh mana-mana orang kepada pegawai polis sepanjang siasatan polis yang dibuat di bawah Bab XIII KTJ yang hendaklah digunakan sebagai keterangan. Pembelaan juga mengatakan bahawa kenyataan itu merupakan pengakuan dan ia boleh diterima di bawah s 17(3) Akta Keterangan 1950 ('AK').

Diputuskan, melepas dan membebaskan tertuduh tanpa pembelaannya dipanggil:

(1) Keterangan PW2 dan PW3 tidak mengaitkan tertuduh dengan kematian si mati dalam apa cara pun. Kehadiran tertuduh di pintu PW2 berlaku tiga jam selepas si mati dikatakan telah meninggal dunia pada hari yang sama. Pada tahap terbaik, semua keterangan PW2 dan PW3 adalah untuk menarik perhatian kepada fakta bahawa tertuduh mengetahui sesuatu telah berlaku. Keterangan PW3 bahawa dia telah diberitahu oleh PW4 bahawa isteri si mati telah memberitahu PW4 yang tertuduh telah menembak si mati, adalah jelas tidak boleh diterima kerana ia merupakan dengar cakap atas dengar cakap (lihat perenggan 9).

(2) Seksyen 17(3) AK menyatakan bahawa sub-s (2) hendaklah tidak terpakai di Sarawak. Hanya s 17(1) terpakai di Sarawak. Menurut peruntukan s 21 AK, pengakuan adalah relevan dan boleh dibuktikan berbanding orang yang membuatnya. Oleh itu, kenyataan yang dibuat oleh seorang berkenaan apa-apa fakta persoalan boleh diterima dalam keterangan. Walau bagaimanapun, sama ada kenyataan boleh diterima akan bergantung kepada fakta dan keadaan kes tertentu. Sebagaimana diperuntukkan dalam s 17(1) AK, perkataan 'made by any of the persons and under the circumstances hereinafter mentioned' mengkehendaki sub-seksyen dibaca bersama seksyen-seksyen lain Akta yang mengikut, khususnya, peruntukan-peruntukan ss 24, 25 dan 26 AK yang mengandungi larangan-larangan terhadap kebolehterimaan pengakuan yang dibuat di bawah keadaan yang ditetapkan (lihat perenggan 13 & 14).

(3) Kenyataan diberikan oleh tertuduh kepada PW9 bahawa dia telah menembak dan membunuh seseorang yang bernama 'Kuing' tanpa ragu suatu pengakuan dan penerimaan. PW9 memberi keterangan bahawa dia berpangkat konstabel apabila tertuduh membuat kenyataan kepadanya. Berdasarkan bahawa pengakuan atau penerimaan tertuduh telah dibuat kepada pegawai polis yang bawah pangkat Inspektor, ia tidak boleh diterima di bawah s 25(1) AK. Bagi sebab ini, meskipun siasatan

polis masih belum bermula apabila tertuduh membuat kenyataan kepada PW9, seperti yang dihujah oleh pendakwaan, kenyataan tertuduh tidak boleh diterima. Oleh itu, selain daripada tindakan tertuduh menyerahkan diri sendiri, tiada apa yang lain daripada keterangan PW9 yang mengaitkan tertuduh dalam kesalahan yang dituduh (lihat perenggan 15).

(4) Jika maklumat daripada tertuduh, sama ada dalam bentuk kenyataan, atau tindakan atau perlakuan seperti menunjuk, jelas membawa kepada penemuan fakta, ia boleh diterima. Justeru, tiada keperluan dari segi undang-undang untuk polis mengendalikan apa-apa kata-kata amaran sebelum maklumat diperoleh dan pasti tiada keperluan menjalankan perbicaraan dalam perbicaraan untuk menentukan kesukarelaan maklumat itu. Kenyataan tertuduh kepada PW18 bahawa dia boleh menunjukkan mereka pondok pekerja dan tindakan tertuduh yang membawa PW18 dan pasukan polis ke pondok pekerja merupakan maklumat. Oleh kerana maklumat itu jelas berkaitan penemuan fakta – pondok pekerja – ia boleh dierima di bawah s 27 AK (lihat perenggan 17 & 18).

(5) Jika senapang patah itu dibuktikan telah digunakan dalam perlakuan kesalahan itu, maka pengetahuan tertuduh tentang tempat di mana ia dijumpai menjadi amat relevan sebagai sebahagian daripada rangkaian keterangan mengikut keadaan daripada mana kebersalahan tertuduh boleh disimpulkan. Walaupun senapang patah itu didapati boleh diservis dan DNA tertuduh telah dikesan atasnya, berdasarkan ketiadaan sisa serbuk letupan dalam laras senapang patah dan dalam selongsong kartrij dalam keadaan sedemikian, senapang patah itu tidak mungkin datang daripada senapang patah yang mana pelet atau peluru telah membunuh si mati. Oleh itu, meskipun tertuduh mempunyai pengetahuan tentang di mana senapang patah itu, ia tidak mengaitkan tertuduh dalam apa cara dengan kematian si mati kerana ia tidak dibuktikan bahawa senapang patah itu telah digunakan dalam perlakuan kesalahan itu (lihat perenggan 21 & 28).]

Notes

For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1911–1919.

Cases referred to

Anandagoda v The Queen [1962] 1 MLJ 289; [1962] 1 LNS 7, PC (folld)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
DPP v Kilbourne [1973] AC 729, HL (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Magendran a/l Mohan v PP [2011] 6 ML J 1, FC (refd)

A *PP v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 3 AMR 193, FC (refd)
PP v Lee Kim Seng [2013] 7 MLJ 844; [2013] 1 CLJ 393, HC (folld)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
B *Prakash Chand v State (Delhi Administration)* 1979 AIR 400, SC (refd)
Pulukuri Kottaya and others v Emperor AIR 1947 PC 67, PC (refd)
R v Exall (1866) 4 F & F 922 (refd)
Rajamorgan a/l Marimuthu v PP [2014] 5 MLJ 565; [2014] 6 CLJ 850, CA (refd)
C *Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)

Legislation referred to

D Criminal Procedure Code ss 113(1), 180, Chapter XIII
Evidence Act 1950 ss 8, 8(2), 17, 17(1), (2), (3), 21, 24, 25, 25(1), 26, 27, 73A
Penal Code s 302

E *Hairun Najmi bin Mashahadi (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.*
Ranbir Singh (Ranbir Singh & Co) for the defendant.

Supang Lian J:

F INTRODUCTION

[1] The accused was charged under s 302 of the Penal Code for the offence of murder. The charge reads:

G > That you, DIS BAYAK (M), on the 17th September 2012 at about 6 pm at Rumah Tarik Pekerja Kern Pembalakan Laresa, Lesung Laku, Belaga, in the district of Belaga, in the State of Sarawak, did commit murder by causing the death of KUENG DING (M), and you have thereby committed an offence punishable under section 302 of the Penal Code.

H

At the trial the prosecution called 18 witnesses. I discharged and acquitted the accused after the conclusion of the case for the prosecution because I found that the prosecution had not made out a prima facie case against the accused. I now give my full grounds of decision.

I

STANDARD OF PROOF

[2] In accordance with the provisions of s 180 Criminal Procedure Code ('the CPC'), my duty at the conclusion of the case for the prosecution was to

determine whether the prosecution had established a prima facie case against the accused. A prima facie case is made out if the prosecution has proved all the essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through maximum or positive process of evaluation. As the accused can be convicted on prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond a reasonable doubt. The test is if the accused is called upon to make his defence and he elects to remain silent, is the court prepared to convict him on the evidence before the court? If the answer to that question is 'Yes', then a prima facie case has been made out but if it is 'No' then, a prima facie case has not been made out: see *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 FC and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457.

[3] The steps to be taken are summarised by the Federal Court in *Public Prosecutor v Mohd Radzi Abu Bakar* at p 467 as follows:

> (i) At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused; and
>
> (ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted.

Therefore, the question for me at the conclusion of the prosecution's case was whether the evidence adduced was sufficient to convict the accused if he elected to remain silent. If the answer was in the affirmative, then a prima facie case had been made out. The converse would lead to an acquittal.

THE INGREDIENTS OF THE OFFENCE

[4] The essential ingredients of the offence charged are:

(a) the death of Kueng Ding;

(b) he died as a result of injuries sustained by him;

(c) that his injuries were caused by or the result of the acts of the accused; and

(d) that in inflicting the injuries upon him the accused either:

A (i) caused them with the intention of causing death; or

(ii) caused them with the intention of causing such bodily injuries as he knew to be likely to cause death; or

B (iii) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

(see *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 at p 501)

C DEATH OF KUENG DING

[5] The defence did not dispute that Kueng Ding ('the deceased') had died. In any case there was ample evidence to show that the dead person as in the charge is Kueng Ding. Damu Ding ('PW7'), the brother of the deceased, D identified the dead body at the Bintulu Hospital mortuary on 24 September 2012. PW7 also identified the photographs of the deceased at the mortuary as shown in P6 (12). Further, the death of the deceased was sufficiently proved through the evidence of the pathologist Dr Norliza bt Ibrahim ('PW8'). She conducted the post mortem of the body of the deceased on 24 September 2012 E the findings of which she had put into writing in her post mortem report exh P9 (the English translation is P9 (a)). Hence, it was beyond doubt that Kueng Ding had died.

DEATH A RESULT OF THE INJURIES SUSTAINED

F

[6] PW8 testified that the injuries inflicted on the deceased are:

(a) ten entry gunshot wounds on the collarbone, the chest, the left forearm and the left wrist;

G (b) nine exit gunshot wounds on the chest and on the left wrist; and

(c) severe internal injuries of the chest consisting of (i) shattered right collar bone and chest plate (ii) multiple fracture of the left ribs (iii) severe laceration of the left lung, and (iv) bleeding in the left chest cavity H measuring 250ml.

According to PW8 the internal chest injuries were fatal in nature and had caused loss of blood leading to the death of the deceased. In her post-mortem report P9 (a), she stated that the cause of death was the chest injury due to the I gunshot wounds. Further, PW8 stated that based on her finding of a piece of wad (which is the casing of a shotgun bullet) in the left chest cavity, the weapon used to cause the injuries might be a shotgun. To my mind, there was no doubt at all that the deceased had died as a result of the gunshot wound injuries that he had sustained.

WHETHER THE INJURIES SUSTAINED WERE CAUSED BY OR IN CONSEQUENCE OF THE ACT OF THE ACCUSED?

[7] To prove this ingredient, the prosecution relied on circumstantial evidence. Circumstantial evidence, it has been said, 'works by cumulatively, in geometrical progression, eliminating other possibilities' (per Lord Simon in *DPP v Kilbourne* [1973] AC 729 at p 758) and has been likened to a rope comprised of several cords: 'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of (per Pollock CB in *R v Exall* (1866) 4 F & F 922 at p 929). Our Court of Appeal in *Rajamorgan a/l Marimuthu v Public Prosecutor* [2014] 5 MLJ 565; [2014] 6 CLJ 850 after referring to the Federal Court decisions *Magendran a/l Mohan v Public Prosecutor* [2011] 6 ML J 1 and *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 puts the point across this way:

> [24] It is clear from the cases cited above that in a case based on circumstantial evidence, the circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused and every incriminating circumstances must be clearly established by reliable and clinching evidence. Circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.

[8] The circumstantial evidence led by the prosecution in respect of this ingredient can be briefly stated as follows. PW2 ('Tang Buon Huat') testified that on 17 September 2012 at about 9pm when he was about to go to bed at his quarters at the Laresa Logging Camp, Lasung Laku, Belaga, the accused came knocking on his door saying that something had happened. When PW2 asked the accused what had happened, the latter did not answer. PW2 then brought the accused in the camp's Land Cruiser to see the camp manager, Chin Oh Guan ('PW3'), at his quarters. PW3 testified that PW2 had told him that the accused wanted to see him but when he asked the accused what had happened, there was no reply forthcoming. On PW3's instruction, PW2 went to look for the camp mandore at his quarters thereby leaving the accused behind with PW3. The latter gave evidence that after a while, the accused left his place. And so it was that when PW2 returned with the mandore (Loh Leh Seng (PW4)) to PW3's quarters, the accused was nowhere to be found. PW3 then gave instructions to PW4 to go to the logging site at Laressa Camp to find out what had happened.

[9] With regard the evidence of PW2 and PW3, in my view it did not implicate the accused in the death of the deceased in any manner whatsoever. It is pertinent to note that the accused's appearance at PW2's door occurred three hours after the deceased had allegedly died on the same day at 6pm as alleged in the charge. At the most, all PW2's and PW3's evidence did was to attract attention to the fact that the accused some three hours after the purported time of the killing of the deceased apparently knew something had happened. As regards the evidence of PW3 that he was informed by PW4 that the wife of the deceased had told PW4 that Dis Bayak had shot the deceased, this was obviously inadmissible for it amounts to hearsay upon hearsay.

[10] PW4 continued with the narrative by saying that he went with two other workers to the logging site the same evening arriving at about 10 to 10.30pm. There they proceeded to a workers' hut where they found Kueng Ding, the deceased, lying motionless on the kitchen floor. PW4 met the wife of the deceased in the hut. When he asked her what had happened she did not answer but kept on crying. He and the two workers then pulled out planks from the hut and made a coffin in which they placed the body of the deceased. Early the next morning of 18 September 2012 at 1.30am, PW4 and a party that included the wife of the deceased, her child and the accused left the logging camp and brought the coffin to the deceased's foster parents' longhouse, namely, Rumah Panjang Mersam Jok which was at the 16 kilometre. PW5 (the headman of the longhouse) and PW6 (an aunt of the deceased) testified that the deceased was subsequently buried at the Long Tebila cemetery at 6pm the same day. The prosecution adduced evidence that five days later ie on 23 September 2012, the investigating officer, Insp Miki Mohan ('PW18'), together with PW5, PW6, PW7, PW8 and a police party went to the cemetery to exhume the body of the deceased. The body was then brought to the mortuary at Bintulu Hospital where PW8 conducted the post mortem on 24 September 2012.

[11] PW4 testified further that in the evening of 18 September 2012 after the burial of the deceased, a gathering was held at the house of the deceased's foster parents at the longhouse. In the course of the evening around 10pm the deceased's foster mother and the wife of the deceased told him that the deceased was shot by Dis. The accused was not present at the gathering. PW5 also testified that on the same evening at 8pm at the longhouse, the wife of the deceased told him that her husband was shot by Dis Bayak who worked at the same place with her husband as a logger. Next to testify on this was PW6. She said that after the burial of the deceased on 18 September 2012, the deceased's wife told her that the deceased died after being shot by Dis. The deceased's wife also told her that she witnessed the shooting but did not know the reason why. The wife of the deceased was not called to testify. It goes without saying that whatever the wife of the deceased had told either PW4, PW5 or PW6 as to who

had shot the deceased was hearsay. The hearsay evidence was only admissible to prove that the wife of the deceased had made these assertions to the witnesses but not admissible to prove the truth of her assertions. Hence, absolutely nothing turned on the evidence of these witnesses that the wife of the deceased had asserted that it was one Dis Bayak that had shot the deceased.

[12] The prosecution next called Const Muhamad Azli Hafidz ('PW9'). He testified that on 19 September 2012 at about 8.30am whilst he was on duty at the Pondok Polis at Sg Asap, the accused came alone and told him that he wanted to surrender himself for he had killed someone. PW9 lodged a report of this which is tendered and marked exh P20. In P20, PW9 stated that the accused had come to surrender himself because he admitted to having shot and killed a man known to him as Kuing on 17 September 2012 at 1800 hrs. Learned defence counsel objected to the admissibility of the statement of the accused on the basis that except as provided in s 113(1) of the CPC no statement made by any person to a police officer in the course of police investigation made under Chapter XIII of the CPC shall be used as evidence. The defence also said that the statement amounted to a confession and it is inadmissible under s 17(3) of the Evidence Act. The learned deputy argued that the statement was admissible because at the time the accused made it, no police investigation had started yet as is the requirement of s 113(1) of the CPC.

[13] Section 17 of the Evidence Act reads as follows:

> (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.
>
> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.
>
> (3) Subsection (2) shall have no application in Sarawak.

With respect, I do not agree with the defence that s 17(3) above provides that confessions are inadmissible in Sarawak. In my view all that s 17(3) says is that sub-s (2) shall have no application in Sarawak. As Stephen Chung J pointed out in *Public Prosecutor v Lee Kim Seng* [2013] 7 MLJ 844; [2013] 1 CLJ 393, it means that only s 17(1) is applicable in Sarawak and the distinction between an admission and a confession as expounded by the Privy Council in *Anandagoda v The Queen* [1962] 1 MLJ 289; [1962] 1 LNS 7 does not apply in that State.

[14] Pursuant to the provisions of s 21 of the Evidence Act, admissions (as defined in s 17(1) are relevant and may be proved as against the person who makes them. Therefore, a statement made by a person as to any fact in issue or relevant fact may be admissible in evidence. However, whether a statement is

admissible will depend on the facts and circumstances of the particular case. As provided for in s 17(1) of the Act the words 'made by any of the persons and under the circumstances hereinafter mentioned' would require that the sub-section should be read together with the other sections of the Act that follow, in particular, the provisions of ss 24, 25 and 26 which contain prohibitions against the admissibility of confessions made under the circumstances specified. Section 113(1) of the CPC also contains prohibitions against the use in evidence of any statement made by any person to a police officer in the course of police investigation made under Chapter XIII.

[15] The prohibition contained in s 25 of the Evidence Act is especially relevant in our present case and it reads as follows:

> (1) Subject to any express provision contained in any written law, no confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved as against that person.

It was held in *Anandagoda v Regina*, that the term 'admission' is the genus of which 'confession' is the species. Hence, a confession is always also an admission. It means too that the prohibition contained in s 25(1) of the Evidence Act although referring to a confession, applies to an admission. In our present case, the statement given by the accused to PW9 that he had shot and killed a person called 'Kuing' was unmistakably a confession and an admission. PW9 testified that he was of the rank of constable on 19 September 2012 when the accused made the statement to him. In view that the confession or admission of the accused was made to a police officer who was below the rank of inspector, in my view, it was inadmissible under s 25(1) of the Evidence Act. For this reason, notwithstanding that police investigation had not yet begun when the accused made the statement to PW9, as the prosecution had contended, I held the statement of the accused to be inadmissible. As such, other than the act of the accused in surrendering himself (which is admissible as conduct under s 8 of the Evidence Act) there was nothing else from the evidence of PW9 to implicate the accused in the offence charged.

[16] PW18 testified that he was at the Police Post at Sg Asap, Belaga on 21 September 2012 and interrogated the accused who was in police custody. The accused informed him that he could show to him a workers' hut at Laressa Camp in Belaga. The accused also gave him information which he reduced into writing, produced and marked P68. The relevant information is as follows: *senapang dan parang saya tahu dan saya boleh tunjuk tempat tu*. After the interrogation, the accused led him and a forensics team that included Insp Suhail bin Saaidi ('PW10') and Sgt Major Mohd Wahed ('PW15') to a workers' hut at Laressa Camp, Lesung Laku, Belaga. They arrived at the workers' hut at 7.20pm in the evening of the same day. PW10 and PW18 testified that inside the hut, the accused pointed to a place on the floor of the

kitchen where a shotgun was found. PW10 seized the shotgun which was tendered and marked P10(b). PW10 found in the barrel of the shotgun a cartridge casing white in colour and with the marking RC12. The spent cartridge was tendered and marked P43(b).

[17] Learned defence counsel submitted that the information given by the accused to PW18 leading to the discovery of the scene and the shotgun was inadmissible because no cautionary words were administered to the accused before it was obtained. Further, there was no evidence adduced to show that the police had not applied oppression, torture, inducement, threat or promise on the accused before he gave the information and no trial within a trial was held to ascertain the voluntariness of the information. With respect, I disagreed with the contentions of the defence on this. In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, Ahmad Maarop FCJ, speaking for the Federal Court, stated as follows:

> [28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Actincludes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information.

Implicit in this statement of the law is that if the information from the accused, be it in the form of a statement, or act or conduct such as pointing out, leads distinctly to the discovery of a fact, it is admissible. Hence, contrary to the contentions of the defence, there is no requirement in law for the police to administer any cautionary words before the information is obtained and certainly no necessity of conducting a trial within a trial to determine the voluntariness of the information.

[18] Reverting to the facts of the present case, I found that the statement of the accused to PW18 that he could show them a workers' hut at Laressa Camp in Belaga and the accused's act of leading PW18 and the police team to the workers' hut at Laressa Camp, Lesung Laku, Belaga amounted to information. And because the information related distinctly to the discovery of a fact – the workers' hut – it is admissible under s 27 of the Evidence Act. Further, the statement of the accused to PW18 as recorded in P68 that he knew of a shotgun and could point out the place where it could be found and his act of pointing to the shotgun P10(b) on the kitchen floor of the workers' hut, amounted to information which related distinctly to the discovery of a fact – the shotgun (P10(b)) and the place on the kitchen floor where it was found. Likewise, the information is admissible under s 27 of the Evidence Act. Thus, the facts thereby discovered from the information given by the accused embraced the shotgun P10(b) and the place on the kitchen floor of the workers' hut where it

was found as well as the accused's knowledge as to these facts.

[19] It must be pointed out that the evidence of the accused leading PW18 and the police team to the workers' hut and pointing out the place where the shotgun was found, was also relevant and admissible as conduct under s 8 of the Evidence Act irrespective of whether any information contemporaneously with or antecedent to any such conduct falls within the purview of s 27 of the Evidence Act: see *Siew Yoke Keong v Public Prosecutor*, at para 29, approving *Prakash Chand v State (Delhi Administration)* 1979 AIR 400.

[20] Learned counsel for the accused submitted that even if the information leading to the discovery of the shotgun was admissible evidence, it does not implicate the accused whatsoever in the death of the deceased. He argued that all the information showed is that the accused knew where the shotgun was and it does not lead to the inference that the accused caused or was responsible for the death of the deceased. Learned counsel referred to a passage from the judgment of Stephen Chung J in *Public Prosecutor v Lee Kim Seng*, where His Lordship said that 'only the information received by PW14 that led to the discovery of the body was admissible under s 27 of the Act. However, this evidence did not lead to the inference that the accused had committed the murder. Even though the accused knew where the deceased's body could be found and he led the police to its discovery, it did not mean that he was responsible for the death of the deceased'.

[21] With respect, whilst I agree with the submission of the defence that the evidence of information given by the accused which led to the discovery of the shotgun on the kitchen floor showed that the accused had knowledge of the shotgun and the place from where it was produced, I do not agree that this evidence can never lead to the inference that the accused was responsible for the killing. To my mind, whether such inference could be drawn depends on whether the prosecution could prove that the shotgun that was found as a result of the information obtained from the accused was used in the commission of the offence. In other words, the evidence of the knowledge of the accused of the place where the shotgun was to be found (facts discovered) standing alone was not sufficient to establish a prima facie case against the accused. However, if the shotgun was proved to have been used in the commission of the offence, then the accused's knowledge of the place where it could be found becomes very relevant as part of the chain of circumstantial evidence from which the guilt of the accused could be inferred. The position is well explained in the celebrated case of *Pulukuri Kottaya and others v Emperor* AIR 1947 PC 67 where the Privy Council said as follows:

> In their Lordships' view, it is fallacious to treat the fact discovered within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the

information given must relate distinctly to the fact. Information as to past user, or the part history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that *'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.* But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. (Emphasis added.)

[22] Further elaboration on this point can be had from *Siew Yoke Keong*, where the Federal Court said:

[30] Now, in Chong Soon Koy, the Supreme Court found that PW3's evidence set out in the passage in the judgment of the Supreme Court which we have just quoted, that included information supplied by the accused to PW3 with regard to a firearm and some ammunition which he (the accused) had hidden in the Berapit Hills as well as his conduct of leading PW3 and the police party to the Berapit Hills and pointing to a spot where the firearm and ammunition were found, alone was sufficient to justify the guilty verdict on the accused, of the offence of possession of firearm and ammunitions. In Chong Soon Koy, from PW3's evidence, the information supplied by the accused consisted of statement as well as conduct which led to the discovery of facts (a firearm and ammunition) which were the very subject matter of the charge. Admittedly *in the present case, the information supplied by Siew (his acts of pointing) did not lead directly to discovery of the proscribed drugs. However, the information supplied by Siew led distinctly to the discoveries of the first and the second facts. The evidence of information supplied by Siew which led to the discovery of those facts standing alone may not be sufficient to establish a prima facie case against Siew. However, as will be shown later in this judgment, that evidence does not stand alone. There are other evidence which must be thrown into the scale. More of this when we deal with the cumulative effect of all the evidence against Siew.* (Emphasis added.)

[23] This brings us to the next question whether the prosecution in the present case had proved that the shotgun P10(b) was used in the commission of the offence charged. In this regard the learned deputy drew the court's attention to the following evidence. PW18 testified that on 20 September 2013 he brought the accused to the Bintulu Hospital where Dr Tiong Chong had taken the blood specimen of the accused in PW18's presence. Dr Tiong then handed over the accused's blood specimen marked exh P56(b) to PW18. PW10 testified that after he had seized the shotgun P10(b) at the scene, he wrapped it in a brown package and handed it to PW18 on 22 September 2012 at 10.30am at the Sg Asap Police Station. PW8 conducted the post mortem of the deceased on 24 September 2012. As we have seen earlier, she found that the deceased had died from chest injuries due to gunshot wounds. She said that the shotgun P10(b) shown to her in court was a possible weapon to cause such injuries. PW18 had passed the shotgun P10(b) and the accused's blood sample P56(b)

A together with other exhibits to Insp Mohd Shoffian. Although Insp Mohd Shoffian was not called, the defence had agreed to admit the fact that on 28 September 2012 the Chemist Rita Ung Hua ('PW14') had received exhibits from him amongst them the shotgun P10(b) and the blood specimen of the accused P56(b) for DNA analysis. This is allowed pursuant to the provisions of
B s 73A of the Evidence Act thereby dispensing with formal proof of these matters. PW14 took swabs on the trigger, butt and hand guard of the shotgun P10(b). She found that the accused's DNA was deposited on the trigger and according to her, it was possible when someone pulls the trigger, his DNA would be deposited there. After analysis PW14 handed the exhibits that
C included P10(b) to Cpl Terrance ('PW17') on 5 April 2013 at the Chemistry Department in Kuching. PW17 in turn handed over the shotgun P 10(b) to Insp Mohd Nor bin Salim ('PW16') on 5 April 2013. PW16 test fired the shotgun and found it be serviceable. On 17 May 2013 he handed P10(b) back
D to PW17 who in turn handed it over to PW18 on 18 May 2013.

[24] The prosecution submitted that based on the foregoing evidence the prosecution had proved the following combination of circumstances against the accused:

E (a) his conduct in surrendering himself at the Sg Asap Police Station which is relevant under s 8(2) of the Evidence Act;

(b) his conduct in showing to the police the shotgun P10(b) (relevant under s 8(2) Evidence Act);

F (c) the accused gave information to the police leading to the discovery of the shotgun P10(b) at the workers' hut at Laressa Camp in Lesung Laku, Belaga (the s 27 information); and

(d) the accused's DNA was found deposited on the trigger of the shotgun.

G

The learned deputy submitted that the circumstantial evidence set out above inevitably lead to one and irresistible inference that it was the accused himself that had caused the death of the deceased by shooting him using the shotgun P10(b).

H

[25] I found that I could not agree with the submission of the prosecution for the reasons as follows. As I have stated earlier, the prosecution needed to prove that the shotgun P10(b) that was discovered from information given by the accused was used in the commission of the offence. Although PW16 had
I found the shotgun to be serviceable and PW14 detected the accused's DNA on its trigger, hand guard and butt, the findings by another chemist Mohd Riduan bin Md Bahkir ('PW11') had created serious doubt in the case for the prosecution that the said shotgun had been fired as recently as 17 September 2012 at 6pm as stated in the charge.

[26] The relevant evidence on this is as follows. PW10 and PW15 testified that whilst at the scene (in the workers' hut at Laressa Camp) on 21 September 2013 at about 7.20pm other than seizing the shotgun P10(b) (which he wrapped in brown packaging E20 (exh P10)), the whole of the shotgun was swabbed by PW15. The original marking of the envelope containing the swab taken from the whole shotgun is E21 (exhP 35) whilst the swab itself was marked as exh P35(b). As for the cartridge casing that was found in the barrel of the shotgun, PW10 testified that on his instruction PW15 had taken a swab of the cartridge whilst it was in the barrel of the shotgun. After that PW10 took it out from the barrel as an exhibit. The original marking of the cartridge casing is E22 whereas the exhibit marking is P43(b). The original marking of the swab taken from the cartridge casing is E23 and its exhibit marking is P24(b). PW18 testified that on 22 September 2012 at 10.30am whilst at the Sg Asap Police Station, he received the shotgun (E20 (P10(b)), the swab from the shotgun (E21 (P35), the cartridge casing (E22 (P43(b)) and the swab taken from the cartridge casing (E23 (P24(b)) plus numerous other exhibits seized from the scene of crime from PW10. PW14 testified that she received the shotgun E20 (P10(b)), the swab from the shotgun (E21 (P35), the cartridge casing (E22 (P43(b)) and the swab taken from the cartridge casing (E23 (P24(b)) and other exhibits from Insp Mohd Sohffian on 28 September 2012. On 4 October 2012 PW14 passed on the shotgun (E20); the expended cartridge casing (E22) and the cotton swab taken from the cartridge casing (E23) to PW11 (the Chemist Mohd Riduan) for criminalistics analysis. She appeared not to have passed on E21. PW11 examined and analysed these exhibits received from PW14 which included taking swabs inside the barrel of the shotgun and the cartridge casing. He did not detect any elements indicative of gun powder residue on either the shotgun (E20); the expended cartridge casing (E22) or the cotton swab taken from the cartridge casing (E23).

[27] Under cross-examination PW11 said that the purpose of his analysis of the shotgun and the cartridge casing was to find out if the shotgun had been recently discharged. He said that if the shotgun had been discharged, it would leave gun powder residue in the barrel. However, over a period of time, gun powder residue may not be present especially if the shotgun was exposed to weather elements. He said that he had come across instances where gun powder residue was still present three months after having been discharged. As for the cartridge casing, he agreed that pellets from it can be manually removed without exploding it. He said that even if the cartridge is not exploded, one can still get gun powder residue inside of the casing.

[28] In our present case, the shotgun E20 (P10(b)) was allegedly discharged on 17 September 2012 at 6pm as stated in the charge. The shotgun and the cartridge casing inside its barrel were seized four days later on 21 September 2012 at about 7.20pm from the workers' hut at Laressa Camp. Based on the

A evidence of PW10, PW15 and PW18 and from the relevant photographs taken at the scene during the discovery and seizure of these exhibits, the shotgun was found lying on the kitchen floor inside the workers' hut. PW15 in particular testified that the shotgun was found in the covered area of the workers' hut and not exposed to the weather. I agree with the defence that it was therefore well B protected from elements of the weather. Hence, following from the evidence of PW11 and the evidence of the circumstances in which the shotgun was found (especially that it was not exposed to weather elements), if the shotgun was discharged as recently as 17 September 2012, gun powder residue ought to have been found in the barrel of the shotgun as well as the expended cartridge C casing. Furthermore, PW11 received the shotgun and cartridge casing on 4 September 2012 and he dated his chemist report 21 December 2012. This was well within the time period of three months that he had on some occasions could still find gun powder residue after the discharge of a firearm. In light of D the absence of gun powder residue in the barrel of the shotgun and in the cartridge casing in such circumstances, I was of the opinion that the shotgun E20 (P10(b)) could not have been the shotgun from which the pellets or bullets that killed the deceased originated from. As such, even if the accused had knowledge of the whereabouts of the shotgun P10(b) (proved by his pointing E out the shotgun or given information leading to its discovery), it did not implicate the accused in anyway in the death of the deceased as it had not been proved that the shotgun was used in the commission of the offence. On this ground alone, the prosecution had failed to prove the third ingredient of the offence that the injuries inflicted on the deceased were caused by or the result F of the acts of the accused.

[29] What then do we make of the evidence that the accused's DNA was detected on the trigger, hand guard and butt of the shotgun P10(b)? To my mind, all that this showed was that the accused at one point or other, might G have used the shotgun. But this did not avail much for the prosecution for the same reason stated earlier that the shotgun P10(b) had been shown not to have been discharged as recently as 17 September 2012 as alleged in the charge. It means that P10(b) could not be the firearm from which the bullets that had killed the deceased had originated from. Furthermore, PW18 testified that H from his investigation, the shotgun P10(b) had previously been used by the deceased and the accused for hunting wild animals. This would then be one explanation as to how the accused's DNA was deposited on the trigger, the hand guard and the butt. To my mind, other than the inference of the accused having used the shotgun to shoot the deceased, the inference of him having I used it to go hunting with the deceased to shoot wild animals was equally and reasonably possible. It is well settled that if the prosecution evidence admits of two or more inferences, then the inference that is most favourable to the accused must be drawn: see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457.

[30] Two other salient findings made by PW14 when conducting DNA analysis on the shotgun P10(b) that cannot be ignored are (a) the detection on the hand guard of a mixed profile of more than two sources, namely, that of the accused, the deceased and Edi Kuing; and (b) detection on the butt of a mixed profile, namely, that of the accused and one other minor contributor that was too weak to be positively identified. Edi Kuing is the infant son of the deceased. To my mind, the presence of the DNA of one other unknown person on the butt of the shotgun P10(b) raised the spectre that even if the shotgun had been used to shoot the deceased, a person other than the accused may have done so. What is more, the presence of the DNA of the infant son of the deceased on the hand guard raised the possibility that there could have been an accidental shooting. It is trite that the doubts that had arisen must be resolved in favour of the accused. For instance, in *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 3 AMR 193 it was held that the 'accused's DNA found in circumstances that may have created suspicion of his guilt is not enough to prove guilt. If there are reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged'.

[31] From the above, it is quite clear that the combination of circumstances alluded to by the learned deputy taken together do not in my judgment lead unerringly to the conclusion that it was the accused that had caused the injuries sustained by the deceased or that they were inflicted in consequence of the act of the accused. For that reason I found and held that the prosecution had failed to prove this ingredient of the offence.

WHETHER THE ACCUSED HAD THE INTENTION TO KILL THE DECEASED?

[32] Intention is to be inferred from the conduct of the accused, circumstantial evidence, the weapon used and the nature of the injury suffered by the deceased. In my opinion, in light that the deceased suffered from chest injuries due to gunshot wounds which were fatal in nature, whoever had inflicted the injuries must be inferred to have the intention to kill the deceased. However, as stated above, the prosecution had failed to prove to the required standard that it was the accused that had inflicted those bodily injuries. It followed that the prosecution also failed in proving this final element of the offence.

CONCLUSION

[33] Given that the circumstantial evidence relied on by the prosecution combined together did not lead to the irresistible conclusion consistent only with the hypothesis of the guilt of the accused, I really was not prepared to

convict the accused if he had remained silent in the event he was called to enter his defence. For that reason I found and ruled that the prosecution had not made out a prima facie case against the accused. Accordingly, I ordered that he be discharged and acquitted of the offence charged without his defence being called.

Accused discharged and acquitted without his defence being called.

Reported by Afiq Mohamad